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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977.

No. 77-752

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

THE CATHOLIC BISHOP OF CHICAGO,
A CORPORATION SOLE,

and

DIOCESE OF FORT WAYNE-SOUTH BEND, INC., ET AL.

BRIEF AMICUS CURIAE OF THE AMERICAN FEDERATION OF TEACHERS (AFL-CIO).

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INTEREST OF AMICUS AND INTRODUCTION.

The American Federation of Teachers is an organization of 1,000 local unions with a total membership in excess of 450,000 teachers. It has collective bargaining relationships with a large percentage of the school districts in which it has locals, including a number of parochial schools. In several instances it has, pursuant to the National Labor Relations Act, petitioned the National Labor Relations Board to enforce bargaining rights of its members in parochial school systems. In the cases pres-

ently before the United States Court of Appeals for the Ninth Circuit and the United States Court of Appeals for the Third Circuit the asserted lack of jurisdiction of the NLRB over labor matters pertaining to parochial schools has been raised as a defense to the obligation of the employer to bargain with a duly certified collective bargaining representative. *Cardinal Timothy Manning, et al.* v. *N. L. R. B. and California Federation of Teachers, Local 3448, United Catholic Secondary Teachers Association,* Doc. No. 77-1286 pending before the United States Court of Appeals for the Ninth Circuit, and *Reverend John J. Caufield et al.* v. *Peter W. Hirsh and Local Union 1776, Association of Catholic Teachers,* Doc. No. 77-2021 pending before the United States Court of Appeals for the Third Circuit. The outcome of the instant litigation will have a determinative impact upon the decision of these cases and will affect hundreds of thousands of educational employees working for parochial school systems. In both the above cases the teachers are represented by the American Federation of Teachers.

Review of the briefs and decisions below lead to the conclusion that the central issue involved in this litigation is whether the assertion of jurisdiction by the NLRB over parochial educational institutions is an impermissable interference with the Free Exercise and Establishment Clauses of the First Amendment of the U. S. Constitution. Although the decision of the USCA for the Seventh Court indicates that Quigley Preparatory Seminary North and Quigley Preparatory Seminary South (hereinafter Quigley Schools) were more religiously orientated than the Diocesan of Fort Wayne-South Bend schools, no basis for that distinction was given other than a reliance on the fact that the Quigley Schools were listed as "minor seminaries." In fact, when given an opportunity to explore the distinction in educational programs between the two school units, counsel for the Catholic Bishop of Chicago and the Diocese of Fort Wayne-South Bend, Inc. declined to do so. A review of the record reveals that the course of study at the Quigley Schools was similar to that of

other college preparatory high schools and that the school was fully accredited as a high school serving students with a wide range of vocational interests.

We, therefore, will address ourselves to the issue in the generic sense rather than examining whether the Board abused its discretion in attempting to assert jurisdiction over a particular educational institution with a uniquely religious emphasis.

ISSUES PRESENTED.

I. Did the Board abuse its discretion in applying its "completely religious—religiously associated" test in determining whether the Quigley and Fort Wayne-South Bend schools had an impact on commerce sufficient for the assertion of Board jurisdiction.

II. Does the application of the National Labor Relations Act to parochial schools necessarily violate the Establishment and Free Exercise clauses of the First Amendment.

STATEMENT OF FACTS.

The National Labor Relations Board (hereinafter "Board") determined that the Catholic Bishop of Chicago, a corporation sole, operates two parochial secondary schools, Quigley Preparatory Seminary North and Quigley Preparatory Seminary South, in Chicago, Illinois. These schools in their academic program, extracurricular activities, and vocational guidance policies function as college preparatory high schools. The course offerings include mathematics, social studies, sciences, foreign languages, fine arts, English and physical education. Each student is required to take courses in religion for one period (45 minutes) three or five days a week. The Quigley schools are accredited by the North Central Association of Secondary Schools and Colleges, are "fully recognized" by the State of Illinois, and are subject to state laws concerning curriculum and attendance. The Diocese of Fort Wayne-South Bend, Inc. operates five parochial secondary schools in Northeastern Indiana that have similar programs. The Seventh Circuit made a determination that the Fort Wayne-South Bend schools had a lower "degree of religious orientation" but were otherwise very similar in educational program.

The Board found that the employers in both instances met its "monetary" tests of having gross operating expenses in excess of one million dollars for the assertion of jurisdiction. The Board further determined that these schools were of the class of educational institutions over which it had previously asserted jurisdiction by reason of accreditation as full-time secondary schools whose operation had a substantial impact on commerce. It held elections and certified collective bargaining representatives upon majority vote of the employees. Both the Catholic Bishop of Chicago, a corporation sole, and the Diocese of Fort Wayne-

South Bend, Inc. refused to bargain with the duly certified representatives of their employees.

The National Labor Relations Board after verifying the refusal of the employers to bargain, petitioned the Court of Appeals for the Seventh Circuit for enforcement of its Bargaining Order.

The Court of Appeals declined to enforce the Bargaining Order on the basis that the Board had abused its discretion in a determining that the schools operated by the employers were merely "religiously associated." It further went on to hold that the assertion of jurisdiction over parochial schools as class by the Board violated the Establishment and Free Exercise clauses of the First Amendment to the U. S. Constitution.

The Board petitioned the United States Supreme Court for a Writ of Certiorari to review that decision of the Court of Appeals. Writ of Certiorari was granted February 21, 1978.

In deference to the Board's careful factual findings and complete Appendix, the American Federation of Teachers adopts the Statement of Facts and Appendix of the Board as if incorporated herein.

ARGUMENT.

I.

THE BOARD HAS THE STATUTORY AUTHORITY TO ASSERT JURISDICTION OVER PAROCHIAL SCHOOLS SUCH AS THE QUIGLEY AND THE FORT WAYNE-SOUTH BEND SCHOOLS.

A. The Board's Standard for Asserting Jurisdiction Does Not Require an Inquiry Into the Religious Nature of the Employers or the Schools.

The Board has in case by case adjudication in this area declined to assert its jurisdiction over parochial schools which are organized solely to provide religious training on a part time basis. See *Board of Jewish Education,* 210 N. L. R. B. 1037 (1974); *Association of Hebrew Teachers,* 210 N. L. R. B. 1053 (1974). In both of these cases, the educational institutions provide a *part time* program of religious instruction.[1] Classes meet in the late afternoons, evenings and on Saturdays to avoid conflicts with programs of academic instruction provided to the students at other educational institutions. The schools did not hire full time instructional staff, nor do they have distinct facilities.

Board member John Fanning in dissenting from the Board's decision in *Association of Hebrew Teachers* criticized its departure from its jurisdictional amount test. However his comments were directed to the administrative and practical considerations of jurisdiction over educational institutions and in no way directed towards discussion of the religious dogma or

1. The schools as a class did not seek or receive any form of state accredidation for their course offerings or educational program. The instructors were not required to be certified by the state nor were academic credits offered for the subjects taught. Because of the nature of their operation, the Board made a *discretionary* determination that there was not a sufficient impact on commerce by these institutions to warrant an assertion of jurisdiction.

educational content of the courses offered at these educational institutions. In neither decision is there a discussion of the appropriateness of these institutions for religious training and/or an examination of the actual matters being taught to the students. It is clear from the decisions themselves the question addressed by the Board is whether or not these institutions have a sufficient impact on commerce to justify an assertion of jurisdiction.

In order to distinguish the two types of parochial institutions, the Board ennunciated a test in which part time religious instructional schools were delineated as "completely religious" and those educational institutions which provide a broad range of services normally associated with an elementary or secondary school education were delineated as merely "religiously associated".

The Court of Appeals determined in its opinion that utilization of the test ennunciated above was an abuse of the Board discretion stating:

> "We find the standard itself to be a simplistic black or white, proported rule containing no borderline demarcation of where 'completely religious takes over or, on the other hand, ceases. In our opinion, the dischotomous,' 'completely religious—merely religiously associated,' standard provides no workable guide to the exercise of discretion. The determination that an institution is so completely a religious entity as to exclude any viable secular component obviously implicates very sensitive questions of faith and tradition. . . . At some point, factual inquiry by courts or agencies into such matters were almost necessarily raised First Amendment problems." (citations omitted.) *Catholic Bishop of Chicago* v. *N. L. R. B.,* 559 F. 2d at 1118 (1977).

The Court of Appeals fails to make any direct showing the "completely religious—merely religiously associated" standard utilized by the board in its previous cases required an inquiry into the religious dogma and/or beliefs in its application. The Court of Appeals places great reliance in support of its

decision in this court's opinions in *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971) and *Meek* v. *Pittenger*, 421 U. S. 349 (1975). These cases are part of a line of school aid cases in which the Supreme Court has grappled with the question of what types of governmental assistance to parochial schools are permissible under the First Amendment "Establishment" clause.

We certainly would not quarrel with the assertion contained therein that the schools here in question were established and are maintained to provide an education from a Catholic viewpoint with the integration of the religious and academic educational curriculum. Certainly the Catholic Church is to be commended for recognizing the importance of education. However, the government has in this century taken an increasing role in providing an education. At present, there is no question that at least through the secondary school level, education has become universally required and considered a governmental function.

In both the Fort Wayne—South Bend, Indiana and Chicago areas, the schools established by the Catholic Church provide a significant portion of the educational services offered both as to the numbers of students and as to the number of teachers employed.[2] In order to operate their school system the employers undertake to meet State accreditation standards and numerous governmental standards. They compete in the market place for full time employees, many of whom are not Roman Catholics. The relationship established is a contractual one in which the teachers are paid employees. The employers are subject to many state regulations such as state minimum wage and unemployment compensation requirements. See *Lemon* v. *Kurtzman*, 403 U. S. at 614. The Quigley schools seek out and receive governmental assistance with regard to their lunch room program, certain instructional materials, and arrange for certain types of instruction to be provided the students. Notably, driver education instruction is handled in conjunction with and in cooperation with the public school system. What is at issue here is not the religious motivation of the employer in maintaining these educational institutions but whether in fact these institutions have a substantial impact on commerce. There can be no question that these institutions, as a class, do have such an impact.

2. In Philadelphia, Pennsylvania fully ⅓ of the students enrolled in elementary and secondary schools in the city attend parochial schools. See Report of the Archdiocese Advisory Committee on the Financial Crisis of Catholic Schools in Philadelphia and Surrounding Counties. This figure is probably consistent with the percent of enrollment in other urban centers.

The Court of Appeals in support of its assertion that the Board's standard for asserting jurisdiction involves an inquiry into religious questions, cities two a passage taken from the testimony before the Board's hearing officer in the Quigley proceedings.[3] There was no showing that the witness on behalf

3. While the Board purported to avoid an excursion into religiosity by the use of its simplistic test, the record in one of the cases reflects several cases of attention to strictly religious matters. There were several questions by counsel for the union on these subjects, and the following occurred in colloquy between the hearing officer and one of the employer's witnesses:

> Q. Now, we have had quite a bit of testimony already as to liturgies, and I don't want to beat a dead horse; but let me ask you one question: If you know, how many liturgies are required at Catholic parochial high schools; do you know?
>
> A. I think our first problem with that would be defining liturgies. That word would have many definitions. Do you want to go into that?
>
> Q. I believe you defined it before, is that correct, when you first testified?
>
> A. I am not sure. Let me try briefly to do it again, okay?
>
> Q. Yes.
>
> A. A liturgy can range anywhere from the strictest sense of the word, which is the sacrifice of the Mass in the Roman Catholic terminology. It can go from that all the way down to a very informal group in what we call shared prayer.
>
> Two or three individuals praying together and reflecting their own reactions to a scriptural reading. All of these—and there is a big spectrum in between those two extremes—all of these are popularly referred to as liturgies.
>
> Q. I see.
>
> A. Now, possibly in repeating your question, you could give me an idea of that spectrum, I could respond more accurately.

See App. A at p. 20a of the NLRB Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit in this cause.

of the employer objected to the line of questioning or that the particulars discussed weighed upon the Board's determination to assert jurisdiction over the Quigley schools. In fact, many of the same matters were inquired into on direct examination by the employer's counsel. Had the employer felt that the line of questioning was constitutionally impermissible, an objection to the line of questioning and a challenge to the Board's authority to consider those issues should have been raised. The employer failed to do so. Certainly, it would be more appropriate to resolve a controversy concerning the Board's right to inquire into a particular line of questioning where an appropriate objection has been lodged and adjudicated by the Board.

The Board can easily apply its "completely religious—merely religiously associated" jurisdictional test to parochial school systems without resort to the line of questioning employed in the Court of Appeal's examples. There are many objective manifestations of whether a particular educational institution purports to offer an elementary or secondary educational experience. The types of accreditations sought and conferred would be one objective standard. The Board could also inquire whether the institution has held itself out as offering instruction equivalent to elementary or secondary school education. There could be a determination whether faculty are required to achieve state certification as a condition of employment. The objective manifestation of the role of the educational institution requires no inquiry into dogma or religious belief.

The record amply supports the determination that there was no abuse of discretion by the Board in asserting jurisdiction over parochial schools which are accredited as elementary or secondary schools. If a determination were to be made that the standard adopted by the Board would involve impermissible inquiry into religious belief of the religious organization, the proper step would not be to invalidate Board jurisdiction, but to expand it. The Board would be required by its broad mandate to assert jurisdiction over educational institutions solely

on the basis of operating revenue in spite of its discretionary determination that certain of these schools do not have a substantial impact on commerce. Imposition of such a requirement would be at odds with the long standing deference by the Courts to the Board in matters affecting its particular field of expertise. See *N. L. R. B.* v. *Stark*, 525 F. 2d 422 (2nd Cir., 1975).

B. The National Labor Relations Act Brings Within Its Ambit Employment Relations at Parochial Schools Which Have a Substantial Impact on Interstate Commerce.

When Congress passed the National Labor Relations Act in 1935, 49 Stat. 449, 29 U. S. C. § 151 *et seq.*, it was its avowed intention to extend the scope of the National Labor Relations Act's coverage to the maximum extent permitted by the Commerce Clause of the United States Constitution. *N. L. R. B.* v. *Reliance Fuel Oil Corporation*, 371 U. S. 224, 226 (1963). The National Labor Relations Act began:

> AN ACT to diminish the cause of labor disputes burdening or obstructing interstate and foreign commerce, to create a National Labor Relations Board, and for other purposes.
>
> * * * * *
>
> *Findings and Policies*
>
> Section 1. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

In *Wickard* v. *Filburn*, 317 U. S. 111 (1942), the Supreme Court found that the scope of the Commerce Clause was as broad as the phrase "affecting commerce". The Court specifically eschewed limiting the scope of the Commerce Clause by such key words as "production" or "consumption". The Court stated:

> Whether the subject of the regulation in question was "production", "consumption", or "marketing" is . . . not material for purposes of deciding the question of federal power. . . . Even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this is irrespective of whether such effect is what might at some earlier time have been as "direct" or "indirect". 317 U. S. at 124-5 (emphasis supplied).

In the case by case approach adopted by the National Labor Relations Board, it chose, in 1944, to extend its jurisdiction to non-profit, charitable, enterprises where the activities of such an enterprise have a substantial effect on interstate commerce.[4] *Polish National Alliance* v. *N. L. R. B.*, 322 U. S. 643 (1944).

In *Polish National Alliance, supra,* the employer was a non-profit fraternal benefit society. It provided to its members in 27 states certain insurance benefits in the form of insurance benefit certificates. In finding the National Labor Relations Board's assertion of jurisdiction appropriate under the Commerce Clause, the Court stated:

> Congress has explicitly regulated not merely transactions or goods in interstate commerce but activities which in isolation might be deemed to be merely local but in the interlacings of business across state lines adversely affect such commerce. By the Wagner Act, Congress gave the Board authority to prevent practices "tending to lead to a

4. The Court of Appeals for the Seventh Circuit does not suggest in *this* proceeding that the activities of these schools do not effect interstate commerce. The history of the Board's jurisdiction policies, however, bear strongly on the legislative history of the Act.

> labor dispute burdening or obstructing commerce or the free flow of commerce." § 2(7) of the National Labor Relations Act (49 Stat. 449, 450, 29 U.S.C. 6152(7), 29 U.S.C.A. § 152(7) Congress therefore left it to the Board to ascertain whether proscribed practices would in particular situations adversely affect commerce when judged by the full reach of the constitutional power of Congress. 322 U. S. 648.

It was against this background that Congress considered amending the National Labor Relations Act in 1947. Senate Bill S. 1126 reported by Mr. Taft left essentially untouched the National Labor Relations Act's definition of "employer" as applied to non-profit institutions, *i.e.* there was no mention of excluding them from the coverage of the Act. *Legislative History of the L. M. R. A. 1947,* Vol. 1 p. 102.

H. R. 3020 reported to the House of Representatives by Mr. Hartley would have excluded from the definition of "employer" ". . . any corporation community chest, fund, or foundation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes. . . . *Legislative History, supra,* at p. 303:

* * * * *

> (C) Churches, hospitals, schools, colleges, and societies for the care of the needy are not engaged in "commerce" and certainly not in interstate commerce. These institutions . . . should be subject to exclusive local jurisdiction.

Churches and schools were not excluded. They were thought not to have a substantial impact on commerce. First Amendment matters were not considered. It was clear that the House majority had overlooked the National Labor Relations Board's assertion of jurisdiction over non-profit employers in *Polish National Alliance, supra.* This oversight was pointed out to the House in the House Minority Report No. 245 on H. R. 3020, *Legislative History, supra,* at 359.

In reconciling the House and Senate versions of the proposed amendments to the National Labor Relations Act, the Senate

version was selected. The House Conference Report No. 510 on H. R. 3020 stated:

> The conference agreement . . . follows the Senate amendment in the matter of exclusion of non-profit corporations and associations operating hospitals. The other non-profit organizations excluded under the House bill are not specifically excluded in the conference agreement, for only in exceptional circumstances and in connection with purely commercial activities of such organizations or of their employees been considered as affecting commerce so as to bring them within the scope of the National Labor Relations Act. *Legislative History, supra,* at 536.

The conference report thus expressly recognized that there were commercial activities of churches and other non-profit employers that could fall within the scope of the National Labor Relations Act. To say that such jurisdiction was, at that time, asserted infrequently by the National Labor Relations Board was not to say it was outside the scope of the National Labor Relations Act or prohibited by the First Amendment.

In sum, both the judicial and the legislative history of the National Labor Relations Act reveal that it was the intent of Congress to "vest in the Board the fullest *jurisdictional* breadth constitutionally permissible under the Commerce Clause." *N. L. R. B.* v. *Reliance Fuel Oil Corp.*, 371 U. S. 224 (1973). It cannot be stated that Congress did not intend the Act to cover either non-profit employers or religious and charitable organizations *if* elements of their operations have a substantial effect upon commerce. The National Labor Relations Board has uniformly applied the Act to individuals who protested that application of the Act violated some religious belief: *Western Meat Packers, Inc.*, 148 N. L. R. B. 444, enforcement denied on other grounds 350 F. 2d 804 (10th Cir., 1965); *A. C. Rochat Company*, 150 N. L. R. B. 1402; *Cap Sante Vue, Inc.*, 172 N. L. R. B. 176 and *Campbell d/b/a Valley Convalescent Center*, 172 N. L. R. B. 174, both cases enforced 424 F. 2d 879 (D. C. Cir., 196[illegible] or to church organizations: *The First Church of*

Christ Scientist, 194 N. L. R. B. 1006 (1972); *First Congregational Church of Los Angeles*, 189 N. L. R. B. 177; *Sunday School Board of the Southern Baptist Convention*, 92 N. L. R. B. 801; *Roman Catholic Archdiocese of Baltimore, Archdiocesan High Schools*, 216 N. L. R. B. 249 (1975).

Based on the above, there should be no question that the Board has the jurisdiction to make a discertionary determination that parochial schools as a class are institutions whose impact on commerce warrant Board jurisdiction. Such a determination is consistent with the rationale expressed in the *Cornell University*, 183 N. L. R. B. 329 (1970), decision. In *Cornell University*, the Board reversed its long standing policy of refusing to assert jurisdiction over not-for-profit educational institutions. In support of its determination, it set forth facts concerning the increased economic impact of educational institutions on the economy. A factor in its determination was the emergence of collective bargaining and its impact at many public institutions. See *Cornell University, Ibid* at 330-334. These determinations serve as a sound basis for the board's determination to assert jurisdiction over employers in the present case.[5]

Pursuant to the *Cornell University* decision, the Board has amended its rules and regulations to provide that it would assert jurisdiction over non-profit colleges and universities which had gross annual revenues of $1 million or more. See § 103.1 NLRB Rules and Regulations, Series 8, as amended. In applying the gross revenues test to not-for-profit educational institutions, the Board was acting in a manner consistent with the jurisdictional standards it had established for other groups of employers. See *T. H. Rogers Lumber Co.*, 117 N. L. R. B. 1732; *Siemons Mailing Service*, 122 N. L. R. B. 81; *Appliance Supply Co.*, 127 N. L. R. B. 1441.

The gross revenues test has been utilized by the Board in the

5. In the Report of the Archdiocese Advisory Committee on the Financial Crisis of Catholic Schools in Philadelphia and Surrounding Counties it was reported that 3.4 million elementary students and 1 million secondary school students attended Roman Catholic schools in 1970 and that total operating expenses of those schools were approximately 1.3 billion dollars.

situations above because of its ease of administration in determining which institutions would be subject to Board jurisdiction. It permits the board to assert jurisdiction over a class of institutions without having to assert it over those institutions that were too small or insubstantial to have a major impact on commerce.

This dollar amount jurisdictional test has been utilized by the Board in the parochial school cases as a preliminary step to asserting jurisdiction over the school systems. As stated by Mr. John Fanning of the board in his dissenting opinion in *Association of Hebrew Teachers*, 210 N. L. R. B. 1053 at 1053-4, the dollar amount jurisdictional test provides a valid independent method for asserting jurisdiction over parochial education institutions.

The Board has made specific findings in the cases currently before the court that the jurisdictional test has in fact been met by the educational institutions. Wholly apart from the additional tests ennunciated by the Board, this serves as an adequate basis to support the Board's discretion to assert jurisdiction over these educational institutions.

II.

THE BOARD'S ASSERTION OF JURISDICTION OVER PAROCHIAL SCHOOLS IS CONSISTENT WITH ITS CONGRESSIONAL MANDATE AND PERMISSIBLE UNDER THE FIRST AMENDMENT.

A. The Board Assertion of Jurisdiction Over Parochial Schools Does Not Offend the First Amendment Free Exercise or Establishment Clauses.

In reviewing the Court of Appeals discussion of the First Amendment issues involved it becomes apparent that this area of law has as yet not seen the development of easily articulated and universally applicable principals to guide courts in making determinations. As stated by the Chief Justice in *Walz* v. *Tax Commission of the City of New York*, 397 U. S. 664 (1970):

> "The Establishment and Free Exercise Clauses of the First Amendment are not the most precisely drawn portions of the Constitution. The sweep of the absolute prohibitions in the Religion Clauses may have been caluculated; but the purpose was to state an objective, not to write a statute. In attempting to articulate the scope of the two Religious Clauses, the court's opinions reflect the limitations inherent in formulating general principles on a case-by-case basis. The considerable internal inconsistency in the opinions of the court derive from what, in retrospect, may been too sweeping utterances on aspects of these clauses that seemed clear in relation to the particular cases but have limited meaning as general principles."

The Chief Justices cautionary comments are certainly in order in reviewing the Court of Appeal's opinion. The Court of Appeals places heavy reliance on this Court holdings in school aid cases where the court is called upon to determine what forms of state assistance to parochial schools would not offend the "Establishment" clause of the First Amendment. See *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971); *Meek* v. *Pittinger*, 421 U. S. 349 (1957); *Roemer* v. *Board of Public Works of Maryland*, 426 U. S 736 (1976). These cases provide a set of principles applicable to a particular problem confronting this court. It is not clear whether the analysis provided would be dispositive of the situation before us now. The court's holdings in the church property cases would appear to be equally if not more directly relevant to the issues raised. See *Presbyterian Church* v. *Mary Elizabeth Blue Hall Presbyterian Church*, 339 U. S. 440 (1969); *Serbian Eastern Orthodox Diocese* v. *Miliuojevich*, 426 U. S. 696 (1977). Also a crutial factor not present in the Court of Appeal's analysis is any consideration of the right of the employees to the protection afforded by the National Labor Relations Act.[6] Certainly the constitution does not prohibit a

6. Contrary to the assertion of the Court of Appeals a significant proportion of public educational employees are afforded statutory rights to collective bargaining by state statutes. Additional numbers of educational employees have established collective bargaining rela-

(Footnote continued on next page.)

civil tribunal from adjudicating federal statutory rights which are available on a neutral basis to a broad spectrum of non-governmental employees.

The religious aid cases have enunciated at tripartite tests for analysis of legislation under the "Establishment Clause."[7] The components of the test are (1) a secular legislative purpose; (2) a primary effect which neither advances no inhibits religion; and (3) the legislation must not foster excess entanglement with religion.

1. The Act Is Secular in Purpose.

The legislative purpose of the National Labor Relations Act is two fold. To promote industrial peace and to prevent obstructions of commerce by assuring employees of the right to select collective bargaining representatives. *NLRB* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240 (1939). The Act gives employees the right to self-organization and bargain with their employer collectively and prohibits certain conduct which would frustrate its purposes. It is entirely secular in its purpose.

2. The Act Neither Advances Nor Inhibits Religion.

The relationship between the employer and teacher is in contractual employment relationship which are enforceable in the courts.[8] The teachers are paid wages and receive other benefits afforded employees. In exchange they commit themselves to work for schools for the school year.[9] The employers in their

(Footnote continued from preceding page.)
tionships with their employers. As noted by the Board of *Cornell University, supra,* the trend in education is towards collective bargaining by public school employees sanctioned by governmental action. See *Catholic Bishop* v. *N. L. R. B.*, 559 F. 2d 1112 at 1124-25.

7. The Court of Appeals in its analysis appears to merge its "Establishment" and "Free Exercise" analysis.

8. Appendix pages 189-191.

9. Ibid at 190.

hiring policy look for teachers with high moral and intellectual qualifications. However, of primary importance in the hiring process is the eligibility of the teacher's certificate as a precondition of employment. Certainly the public and non-secretarian private schools have very similar goals in their hiring process. The Act would have not impact on this process.

A short review of the Board's obligations under the Act will show that it in no way involves the religious perogatives of the employer in the operation of the schools. The employer is not required to make concessions nor even discuss any subjects beyond the scope of wages, hours, and other terms and conditions of employment. The Court of Appeals in its decision cites to a law review article which indicate the authors belief that bargaining inevitably leads to conations by the employer.[10] Certainly it is the goal of any bargaining relationship that agreements can be reached which are satisfactory to both the employer and employees. However, the particular form of the agreement is left to determination of the parties. The Board has developed a case by case approach in determining whether a particular items is subject to bargaining. *Hughes Tool Co.*, 147 N. L. R. B. 1573 (1964); *ILA Local 1367*, 148 N. L. R. B. 897 (1964). Such an approach has stood the test of time and would be a more appropriate forum in which to determine whether a particular subject is inappropriate for bargaining. *N. L. R. B.* v. *Borg-Warner Corp.* 356 U. S. 342 (1958) (Certain subjects are permissive, but either side may refuse to discuss them). Certainly the experience with collective bargaining in public schools has not followed the course outlined in such prophetic terms in the law review article cited above. It would be more appropriate to leave resolution of any possible scope of bargaining question to the case by case adjudication process developed by the Board rather than engage in further speculation about possible conflicts. It has not generally been judicial practice to strike down a statute

10. Brown, *Collective Bargaining in Higher Education,* 67 Mich. L. Rev. 1067 (1969) quoted at 559 F. 2d 1112.

as unconstitutional in anticipation that particular applications as yet unknown, may infringe on some constitutional protection. *Hunt* v. *McNair*, 413 U. S. at 744; *Roemer* v. *Board of Public Works*, 426 U. S. 736 (1976). The Board should be given an opportunity to resolve any problems which might arise prior to a summary removal of jurisdiction.

In *Walz* v. *Tax Commission of the City of New York*, 397 U. S. 664 (1970) this court grappled with the question of whether the exemption from taxes of religious organizations in the context of the statute which provided exemption from taxes to a number of other not-for-profit organizations, violates the "establishment" clause of the constitution. In holding that the statute in question neither advanced nor inhibited religion, the Chief Justice stated:

> "[NEW YORK] has not singled out one particular church or religious group or even churches as such; rather it has granted exemption to all houses of worship within a broad class of property owned by non profit, quasi-public corporations . . ." *Walz* v. *Tax Commission of New York Chg*, 397 at 673.

The Act likewise does not single out religious bodies on any particular religious basis in making its determinations. It therefore in no way inhibits or advances a particular religious viewpoint.

With regard to the Board's role in reviewing disputes between the employer and employees, the issues before the Board would be limited to the purely secular concern of whether the employer has failed to bargain with representatives of his employees or had taken action based on anti-union animus. The validity of the religious views of the employer would not be at issue. The right of the employer to act on the basis of religious considerations or concerns would likewise not be at issue. The sole issue would be whether the conduct of the employer violated the Act's prohibitions.

As stated in *Presbyterian Church* v. *Mary Elizabeth Blue Hall Presbyterian Church*, 399 U. S. 440 at 449 (1969):

> "Civil Courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property. And there are neutral principles of law developed for us in all property disputes, which can be applied without 'establishing' churches to which property is awarded."

The Board would in the adjudication of claims of violation of the act simply be applying the "neutral principles" of labor law to those disputes. When and if the Board were to overstep constitutional limits, the employer would be free to challenge the Board's action in the courts.

The matter before us concerns the right of employees to organize and bargain with their employer pursuant to a statutory right. The Board is not called upon to pass upon matters which have been the subject of a body of canon law and subject to adjudication in ecclesiastic courts. There is no basis for asserting that by contracting for employment with the employers herein, these employees have knowingly waived their constitutional and statutory rights. Certainly the employment policy of the employers[11] and the provision for minimum wage and unemployment compensation coverage would lead them to believe they are to be afforded the protection of general welfare legislation.

As recently affirmed in *Serbian Eastern Orthodox Diocese for the United States of America and Canada* v. *Milivojevich*, 426 U. S. 696 (1977) a civil tribunal can determine the rights of a person under civil laws such as the Act. The only time deference is mandated to the decisions of ecclesiastic tribunals is where the matter is particularly within their purview. The rights granted under the Act do not fall within that narrow exception. Therefore the adjudication of the rights granted under the Act by the Board in no way inhibits or advances any religion.

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11. Appendix, Page 191.

3. The Board's Role in Protecting the Right of Employees to Choose a Collective Bargaining Representative and to Bargain Collectively Does Not Require Excessive Entanglements with the Religious Prerogatives of the Employer.

In *Lemon* v. *Kurtzman*, 403 U. S. at 614 this court stated:

> "Our prior holdings do not call for total separation between church and state; total separation is not possibly in an absolute sense. Some relationship between governmental and religious organizations is inevitable . . ."

In the area of elementary and secondary education the role of the state is quite pervasive. In the operation of the schools in question the church actively seeks state accreditation for its educational programs. In order to achieve that accreditation it is required to hire only those teachers who are certificated by the state after meeting certain academic qualifications. The employers must provide certain academic components in their program and are required to maintain extensive records, *i.e.* student attendance and academic achievement. All these requirements are faithfully maintained.

There can be no question that the amount of alleged intrusion by the assertion of NLRB jurisdiction is much less in scope and degree. The Board's involvement would be limited to holding an election among the employees to determine whether they wish to elect a collective bargaining representative. Participation in the election process is purely voluntary and need not even occur at the work place.

The Board's jurisdiction upon the certification of a bargaining agent is extremely limited. The Board merely requires that the employer meet and bargain with his employees concerning wages, hours and other terms and conditions of employment and not take discriminatory action with regard to the employees' right to engage in or refrain from union activities.

The Court of Appeals asserts that the certification of a union:

> "necessarily alters and impinges upon the religious character of all parochial schools. No longer would the Bishop be the sole repository of authority as required by church law" 559 F. 2d at 1123.

Such a statement involves the misapprehension of the Board's role. Under the Act the employer would have no obligation to concede to any of the demands of his employer. Nor would he be under any obligation to even discuss matters which do not fall in the limited area of wages, hours, and other terms and conditions of employment. See *H. K. Porter Company* v. *N. L. R. B.*, 397 U. S. 99 (1970).

The purpose of setting up the mechanism of bargaining is to provide for the resolution of labor disputes without obstruction of the free flow of commerce, *N. L. R. B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937). Because of the importance of this mechanism, the courts have repeatedly rejected claims that the Act's mandatory bargaining [(*Cap Santa Vue, Inc.* v. *N. L. R. B.*, 424 F. 2d 883 (D. C. Cir., 1970)] and union shop [(*Yott* v. *North American Rockwell Corp.*, 501 F. 2d 398 (9th Cir., 1974) and *Linscott* v. *Millers Fall Co.*, 440 F. 2d 14 (1st Cir., 1971), *cert. den.* 505 U. S. 872)] provisions must yield to conflicting religious views.

Certainly the Bishop like many employers, may not welcome his duty to bargain, but the obligation cannot be defeated simply by asserting that the ultimate decision-making power should be vested in a religious authority. The Act does not in any way take away the employer's ultimate decision-making authority. It merely requires that a dialogue take place in an effort to promote labor peace. The religious beliefs of the employer provide no blanket immunity from general social legislation enacted for the benefit of society. See *Everson* v. *Board of Education*, 303 U. S. 1 at 16 (1947).

If the employer is permitted to abrogate his obligation with regard to collective bargaining, what additional federal welfare legislation will be challenged on the same basis, *i.e.*, unemployment compensation, workmen's compensation and I. R. S.

record keeping functions? These legislative enactments are intended to provide general social benefit. They have all been upheld against challenges that their application offended religious prerogatives.

In the present situation to provide an exemption from the operation of the National Labor Relations Act would in reality be the promotion of the establishment of the Roman Catholic religion by exempting it from the responsibility with which other educational employers must live. It would also remove from the protection of the Act approximately 90% of teachers in private educational institutions. There has been no showing of direct entanglement with the religious prerogatives which would justify the refusal to allow a federal statute to operate for the protection of the collective bargaining rights of the overwhelming majority of private elementary and secondary teachers.[12]

The other area of possible entanglement listed by the Court of Appeals were hypothetical situations where the employer would dismiss an employee for assertedly religious reasons, while the employee would contend that the dismissal was based on union activities. When this court was faced by a similar First Amendment challenge to the firing of an editorial employee in *Associated Press* v. *N. L. R. B.*, 301 U. S. 103 at 133, it stated:

> "(The Employer) seeks to bar all regulation by contending that regulation in a situation not presented would be invalid. Courts deal with cases on the basis of the facts disclosed never with nonexistent and assumed circumtances."

As the *Associated Press* case showed not every case where a First Amendment claim is asserted, the matter resolved on that basis. The Board should be given an opportunity to develop criteria for application to unfair labor practice charge involving religious institutions as they develop on a case-by-case basis.

12. There are 107,856 lay faculty members in the 9,976 primary and secondary schools affiliated with the Catholic Church in the United States. Official Catholic Directory, general summary, pp. 1-2 (1977).

There is every reason to hope that in the context of collective bargaining, any disputes that arise can in the overwhelming majority of bargaining relationships be resolved withou. resort to the Board's proceedings.

The Catholic Church has been in the forefront in the struggle for the rights of workers long before such action was popular in governmental circles. We see no basis for presuming that its actions in bargaining with its employees would constantly bring it into conflict with the Act's prohibitions. Where Board involvement is necessary, it should be given an opportunity to develop procedures and articulate standards for dealing with these problems. See *Grutka* v. *Barbour*, 549 F. 2d 5 (7th Cir., 1977), *cert. denied*, 431 U. S. 908. The situation before us in no way presents a problem of the same magnitude as the day-to-day determinations involved in the school aid case.

Reviewing the areas of possible church-state entanglements delineated by the Court of Appeals, no impermissible entanglement has been demonstrated. The Board's limited involvement in protecting the rights of the employees does not require an involvement in the legitimate religious prerogatives of the Church. Its role in the schools is certainly less pervasive than other forms of governmental involvement which have been imposed or voluntarily undertaken by the employers. The speculative and hypothetical examples of possible conflict in unfair labor practice proceedings may present questions of interest for legal scholars, but they are not now ripe for adjudication and quite possibly will never require adjudication.

B. A Compelling State Interest Justifies Whatever De Minimus Interference with First Amendment Rights Which May Exist.

The National Labor Relations Act represents a legislative judgment of the importance of collective bargaining in promoting labor peace and the economic well being of workers. Permitting employees to bargain collectively has reduced rather than

heightened the conflicts in labor relations and has led to a high standard of living for unionized employees. *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1 at 42. The employees in these school systems have determined through a majority vote and elections conducted by the Board that they wish to engage in collective bargaining. The taking of this step is consistent with the basic tenets of the Catholic Church.

The Catholic Church has championed the rights of workers to organize long before it became the public policy of the federal government. As stated by the Fathers of the Second Vatican Council:

> Among the basic rights of the human person must be counted the right of freely founding labor unions. These unions should be truly able to represent the workers and to contribute to the proper arrangement of economic life. Another such right is that of taking part freely in the activity of these unions without risk of reprisal. Through this sort of orderly participation, joined with an ongoing formation in economic and social matters, all will grow day by day in the awareness of their own function and responsibility. Thus they will be brought to feel that according to their own proper capacities and aptitudes they are associates in the whole task of economic and social development and in the attainment of the universal common good. *Pastoral Constitution on the Church in the Modern World* (67-68), in The Documents of Vatican II 199, p. 277 (Abbott ed. 1966).

In view of the important governmental policy which the National Labor Relations Act embodies, there would have to be a showing of a major infringement on First Amendment rights in order to justify the invalidation of its application to the employers before the Court. The Act by its terms is totally neutral with regard to any legitimate religious prerogative of the Catholic Church. The employers have not shown how any action taken by the Board would require them to take actions repugnant to their religious beliefs. In fact that Catholic Church has been one of the strongest and most consistent advocates of

collective bargaining. The application of the Act to parochial schools seeks to do no more than to extend such rights to a group of employees who work in a religiously associated institution. Certainly the Board should at least be given an opportunity to work out whatever problems its assertion of jurisdiction may entail. We must presume that the Board will act in a manner consistent with constitutional principles. See *Rescue Army* v. *Municipal Court of Los Angeles*, 331 U. S. 549.

The case of *Wisconsin* v. *Yoder*, 406 U. S. 205 (1972) dealt with the closely related question of whether a state compulsory school attendance requirement could be sustained in the face of a showing that the requirement was repugnant to the religious convictions of the parents of the students. This court recognized that a compelling state interest could justify regulation of conduct, but after weighing the unique history of the Amish faith, it determined that the regulation in question was violative of the First Amendment rights of Amish parents. None of the factors which weighed so heavily in the court's determination are present in this case. The employers in this case cannot argue that collective bargaining is repugnant to their religious beliefs. Nor can they assert that they have attempted to withdraw from contact with outside society in the operation of their schools. In fact, the regulation in question may not even be exercised unless their employees feel that they have been unfairly treated because of their activities on behalf of collective bargaining. If the employers' act in a manner consistent with the principles of the highest authorties of their Church, they would probably have no involvement with the Board in the future. We do not understand the employers fears unless they will be taking actions contrary to the Act. They neither are required to make concessions in bargaining nor to refrain from acting based on their religious convictions. Although they may feel that any restrictions on their unbridled discretion should not be permitted, they are operating in a sphere of governmental concern and have voluntarily acted to meet numerous governmental restrictions in order

to engage in providing primary and secondary education. The Act's effect on the operation of the schools is well within the other regulations which have been permitted. Any attempt to cutback the permissible breath of regulation would have the effect of undercutting the application of a host of social welfare legislation. i.e. unemployment compensation, workmen's compensation, and Fair Employment Practices Legislation. It would also deprive the overwhelming majority of private elementary and secondary school employees of the right to organize. The employer has made no showing which would justify such a sweeping denial of statutory rights to this class of employees.

CONCLUSION.

The American Federation of Teachers is concerned that the rights of parochial school teachers be considered in any challenge to Board jurisdiction.

Certainly the Board has the discretion to assert jurisdiction over parochial schools because of their impact on commerce. It has repeatedly asserted jurisdiction over other not-for-profit institutions without appartent problem. The legislature has reacted to this development by amending the Act to provide for coverage of not-for-profit hospitals. This was the only class of not-for-profit institutions previously exempt from coverage This conscious and reasoned determination to assert jurisdiction should not be lightly set aside. The Court of Appeals has failed to show any present impermissible inquiry into the religious prerogatives of the Catholic Church. Mere speculation is not a proper basis to invalidate jurisdiction.

Board jurisdiction has not been shown to have any direct impact on the legitimate religious prerogative of the Catholic Church. Collective bargaining is not repugnant to the beliefs of the Catholic Church. In fact, the Catholic Church has been a

major campaigner for collective bargaining. There is no reason to believe that the employers herein would in their collective bargaining relationships be forced to take any steps that would bring them in direct conflict with the Board. Certainly they would not be required to conceed to any demand or to forgo their religious concerns in hiring employees. Any conflict that would develop would be more appropriately dealt with on the basis of an actual factual situation. The courts and the Board may never be called upon to deal with the hypotheticals presented by the Court of Appeals.

The Act represents a legislative determination that collective bargaining serves compelling state purposes. None of the highly speculative and hypothetical conflicts outlined by the Court of Appeals justify prior restraint on the Board. The Board should first be given an oppportunity to resolve whatever potential for conflict exists. To do otherwise would needlessly deprive over 100,000 employees of their statutory rights.

Respectfully submitted,

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